

Land Use Controls: An Eclectic Summary for 1980-1981

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"After all, if a policeman must know the Constitution,
then why not a planner?"

Mr. Justice Brennan,
dissenting in *San Diego*
Gas & Electric Co. v.
City of San Diego

FROM THE U.S. SUPREME COURT in Washington to the shores of Hawaii, land use issues continue to boil and bubble across the country. The taking issue¹ is upon us again, and plans converted into laws in land use "revolutionary" states² keep them at the cutting edge of land use controls. These and other timely land use developments (historic preservation, amortization of nonconforming uses and inclusionary zoning) are the main focus of this article. Other "short takes" touch briefly upon selected recent developments around the country in Section 1983 actions affecting land use, referendum zoning, aesthetics and architectural control, and water pollution/land use. For the most part, the developments deal with cases, ordinances, and statutes from the 1980-81 period, though occasionally other material is cited for background or amplification of the issues raised in the most recent developments.

A. The Taking Issue Redux

A number of commentators³ have attempted to deal with the troublesome issue raised by Justice Holmes in 1922 when he de-

1. Bosselman, Callies & Banta, *The Taking Issue* (cited in ch. 4, CEQ 1973) (report prepared for Council on Environmental Quality).

2. Bosselman & Callies, *The Quiet Revolution in Land Use Controls* (cited in ch. 1, CEQ 1972) (report prepared for Council on Environmental Quality); Healy, *Land Use and the States* (The Conservation Foundation (1976)).

3. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (wherein the same

cided that a land use regulation, if it went too far, would amount to a taking without compensation contrary to the Fifth Amendment.⁴ Recent developments make those discussions particularly relevant this year.

1. *The Supreme Court, Taking and Ripeness, or, We Really Don't Want to Decide This One, Do We?*

A prime candidate for 1979–1980s judicial “laboring to bring forth a mouse” award might well go to the Supreme Court in *Agins v. City of Tiburon*.⁵ There, it will no doubt be fondly remembered, the Court managed to sidestep the only issue worth deciding:⁶ must government actually pay compensation for a land use regulation which is so onerous that it constitutes a “taking” under the Fifth Amendment? The Court held that there hadn’t been such a “regulatory taking,” you see, so one couldn’t really say.⁷

Then, this year, out of southernmost California, came *San Diego Gas & Electric Co. v. City of San Diego*,⁸ and the compensation issue was raised once more. The Supreme Court again ducked the issue (this time by 5–4) on the barely plausible ground that the state court decision appealed from was not final! The majority has shrunk, however, and a united dissenting minority, per Justice Brennan, gives more than a hint of how the Court might eventually

commentator adopts different views, illustrating the difficulty of drawing boundaries.) See also Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Just Compensation for Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969); *The Taking Issue*, *supra* note 1.

4. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

5. 447 U.S. 255 (1980).

6. We all know the California courts won’t let landowners/developers build anything! See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Comm’n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

7. 447 U.S. at 263. The author has long questioned the wisdom of “regulatory taking” decisions which were first engrafted on the Constitution by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1927). See *The Taking Issue*, *supra* note 1. As will appear below, Justice Brennan, writing for a four-justice dissent in *San Diego Gas & Electric Co.*, appears bent upon hauling *Pennsylvania Coal Co.* from the grave to which many state courts have been attempting to consign it these past few years. A full discussion of the dissent and its implications follows.

8. — U.S. —, 101 S. Ct. 1287 (1981). For an exposition of the facts of the case, its California history and the compensation issue generally, see Duerkson & Mantell, *Interim Damages: A Remedy in Land Use Cases?*, 33 LAND USE LAW AND ZONING DIG. 6 (April, 1981).

decide the issue. It is a chilling premonition for local government while a relief to landowners who have often gone wholly without remedy in California and elsewhere when highly restrictive government regulations have virtually destroyed land values even when the regulation itself is deemed and is held to be illegal.⁹

The facts are straightforward. San Diego Gas & Electric Company acquired a 412-acre site in 1966 for a nuclear power plant. Approximately 214 acres lay in or near an estuary and were zoned for industrial and agricultural use. In 1973, the city apparently reclassified all the property as agricultural, adopted an open space plan covering much of the site, and proposed a bond issue to acquire it. Unfortunately, the city's citizens failed to approve the bond issue. The company immediately sued the city and a number of its officials, alleging that by reason of both the plan and the agricultural zoning, there had been a taking of property without compensation in violation of the United States and California Constitutions. The company further alleged that the city always refused to approve developments contrary to its plans even though no such development plan had been presented to the city by the company.

The trial court concluded that the city had indeed taken the property and that just compensation was required. It subsequently awarded the San Diego Gas & Electric Company over \$3 million.¹⁰ The court of appeal affirmed on the grounds that the evidence supported the company's contention that industrial use was the only feasible use of the premises and that the city would have denied such an application for development.¹¹

Within months, however, the California Supreme Court both granted the city's petition for a hearing¹² and handed down its *City of Tiburon* decision. That decision specifically denied a compensation remedy to one "deprived of substantially all beneficial use of his land by a zoning regulation. . . ."¹³ Only an action for mandamus or declaratory relief was left him. *San Diego* was then "retransferred" to the court of appeal which reversed itself and the trial court on the compensation issue, but let the zoning and open

9. The outrageous practices of some local governments are touched upon briefly in ___ U.S. at ___ n.22, 101 S. Ct. at 1305 n.22 (Brennan J., dissenting).

10. ___ U.S. at ___, 101 S. Ct. at 1291.

11. 146 Cal. Rptr. 103 (Ct. App. 1978).

12. Under California law, the California Supreme Court's grant of petition for a hearing automatically vacates the appeals court decision "depriving it of all effect." ___ U.S. at ___, 101 S. Ct. at 1291.

13. *Id.* at ___, 101 S. Ct. at 1292.

space plan stand, noting that the electric company had not presented any development plans. The company then appealed to the United States Supreme Court.

It was on these procedural facts that a bare majority of the Court held that the appeal "must be dismissed because of the absence of a final judgment."¹⁴ The Court focused on the part of the California court of appeal's unpublished second decision which noted that the appropriateness of mandamus or declaratory judgment was a matter of "disputed fact issues" which "can be dealt with anew should [appellant] elect to retry the case."¹⁵ The Court stated:

[W]e read [this somewhat ambiguous phrase] as meaning that appellant is to have an opportunity on remand to convince the trial court to resolve the disputed issues in its favor.

....

The Court of Appeal has decided that monetary compensation is not an appropriate remedy for any taking of appellant's property that may have occurred, but it has not decided whether any other remedy is available because it has not decided whether any taking in fact has occurred. Thus, however we might rule with respect to the Court of Appeal's decision that appellant is not entitled to a monetary remedy—and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly—further proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore, is not final, and we are without jurisdiction to review it.

Because section 1257 permits us to review only "[f]inal judgments or decrees" of a state court, the appeal must be, and is, dismissed.¹⁶

In dissent, Justice Brennan cogently argued for a four-member minority that the Court's holding misread that of the court of appeal:

In faithful compliance with the instructions of the California Supreme Court's opinion in *Agins v. City of Tiburon*, *supra*, the Court of Appeal held that the city's exercise of its police power, however arbitrary or excessive, could not *as a matter of federal constitutional law* constitute a "taking" under the Fifth and Fourteenth Amendments, and therefore that there was no "taking" without just compensation in the instant case.¹⁷

The dissent reached this conclusion through examination of the California Supreme Court's decision in *City of Tiburon*:

The Court of Appeal's analysis was required by the California Supreme Court's opinion in *Agins v. City of Tiburon*, *supra*. There the Court stated:

14. *Id.* at ___, 101 S. Ct. at 1293.

15. *Id.* at ___, 101 S. Ct. at 1292–93.

16. *Id.* at ___, 101 S. Ct. at 1294.

17. *Id.* at ___, 101 S. Ct. at 1297 (Brennan, J., dissenting).

Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of [plaintiff's] property without payment of just compensation" for which an action in inverse condemnation will lie. *Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument* believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. 24 Cal. 3d, at 272, 157 Cal. Rptr., at 372, 598 P.2d, at 28 (brackets in original) (emphasis added).

A landowner may not "elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 157 Cal. Rptr., at 375, 598 P.2d, at 28 (emphasis added).¹⁸

As a result of *City of Tiburon*, the dissent determined:

The trial court has held expressly that the "actions of defendant City . . . taken as a whole, constitute a *taking* of the portion of the plaintiff's property designated as open space without due process of law and just compensation within the meaning of the California and United States constitutions." Joint App. 42-43 (emphasis added). The Court of Appeal reversed this holding and concluded as a matter of law that no Fifth Amendment "taking" had occurred. This is indistinguishable, then, from a dismissal of appellant's case for legal insufficiency. In any such dismissal, factual questions are necessarily left unresolved. But when a litigant is denied relief as a matter of law, the judgment is necessarily final within the meaning of section 1257.¹⁹

Justice Brennan then set out in detail how he and his three dissenting brethren would address the merits. What made this dissent particularly relevant was Justice Rehnquist's concurring opinion (the "swing" vote), in which he stated: "If I were satisfied that this appeal was from a 'final judgment or decree' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion. . . ." ²⁰ It is, therefore, just conceivable that we have here a bare majority agreed on Justice Brennan's dissent for a decision on the merits.

Government should be thankful for small favors; the dissent would at least permit the government the option of rescission, rather than permit the landowner to choose whether to seek full compensation or mandamus/declaratory relief. Nevertheless, the dissent—and probably Justice Rehnquist—clearly favor extending the protection of the fifth amendment, for decades presumed to

18. *Id.* at ___, 101 S. Ct. at 1298 (Brennan, J., dissenting).

19. *Id.* at ___, 101 S. Ct. at 1300 (Brennan, J., dissenting).

20. *Id.* at ___, 101 S. Ct. at 1294 (Rehnquist, J., concurring).

apply only to eminent domain cases, to "regulatory takings" as well. Whether or not *City of Tiburon* actually holds, as the dissent claims, that a city's exercise of the police power, however arbitrary and excessive, cannot as a matter of federal constitutional law constitute a taking within the meaning of the Fifth Amendment, the dissent declares that such a holding "flatly contradicts clear precedents of this Court."²¹ No matter that many of the cases cited in which the Court found a taking are not land use regulation cases,²² since the dissent ultimately reaffirms its reliance on their "source," *Pennsylvania Coal Co. v. Mahon*,²³ in which Justice Holmes wrote for the majority: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."²⁴

Dismissing "mere invalidation" as an insufficient remedy once a taking by regulation has been found,²⁵ Justice Brennan, nevertheless, would hold that to require formal condemnation by the city would go too far.²⁶ He offered this solution:

The constitutional rule I propose requires that, once a court finds a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation. Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary "takings" involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory "taking." As a starting point, the value of the property taken may be ascertained as of the date of the "taking." . . . The government must inform the court of its intentions vis-à-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. *Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking."* Rules of valuation already developed for temporary "takings" may be particularly useful to the courts in their quest for assessing the proper measure of monetary relief in cases of revocation or amendment . . . , although additional rules may need to be developed. . . . Alternatively the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in

21. *Id.* at ___, 101 S. Ct. at 1301 (Brennan, J., dissenting), *citing, inter alia*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

22. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1971); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

23. 260 U.S. 393 (1922).

24. *Id.* at 415.

25. ___ U.S. at ___, 101 S. Ct. at 1306 (Brennan, J., dissenting).

26. *Id.* at ___, 101 S. Ct. at 1307 (Brennan, J., dissenting).

either case the action must be sustained by proper measures of just compensation.²⁷

Sic transit the taking issue?

2. A More Traditional View of the "Taking Issue"

A distinctly different and, until *San Diego Gas & Electric Co.*, an increasingly more typical view of the "taking issue" was recently expressed by the Supreme Court of Florida in *Graham v. Estuary Properties, Inc.*²⁸ There, the court held that a denial of permission to develop a tidal marsh was a reasonable restriction on the use of land. The facts are relatively straightforward.

Estuary Properties sought approval of a "Development of Regional Impact" (DRI)²⁹ from county officials to construct 26,500 dwelling courts, 11 commercial centers, 4 marinas, 5 boat businesses, 3 golf courses and 28 acres of tennis facilities on 1,800 acres of tidal wetlands populated mainly by black mangroves. Based on the recommendation of a regional planning council, the county denied the application largely on the ground of environmental degradation. The county indicated that development, if permitted at all, would be permitted at no more than half the requested density, provided certain drainage conditions were met and local infrastructure problems were solved. An appeal to the appropriate state administrative agency failed. The Florida Court of Appeals reversed, directing the state administrative agency to enter an order granting Estuary Properties permission to develop as originally requested unless the county commenced condemnation proceedings.³⁰

The Florida Supreme Court, however, agreed with the county and the agency. While agreeing that the degree to which there is a diminution in the property's value is a factor in determining "when the valid exercise of the police power stops and an impermissible encroachment on private property rights begins," the court listed five other factors as well, including whether there has been a physical invasion, whether the regulation promotes health, safety and welfare, and whether the regulation is arbitrarily and capri-

27. *Id.* at —, 101 S. Ct. at 1307-08 (Brennan, J., dissenting) (emphasis added).

28. No. 58,485, slip op (Fla. Apr. 16, 1981), *rev'g* 381 So. 2d 1126 (Fla. Dist. Ct. App. 1979).

29. Required under Florida's famous Environmental Land and Water Management Act, FLA. STAT. ANN. § 380.06 (West Supp. 1981), patterned after the American Law Institute's Model Land Development Code.

30. No. 58,485, slip op. at 1-4 (Fla. Apr. 16, 1981).

ciously applied. Moreover, it specifically equated the "diminution" standard with "whether the regulation precludes all economically reasonable use of the property."³¹

While admitting that a regulation may be a valid exercise of the police power and still result in a taking (Holmes strikes again as the court cited *Pennsylvania Coal Co. v. Mahon*), the court observed that "[p]rotection of environmentally sensitive areas, and pollution prevention are legitimate concerns within the police power"³² and cited with approval the Supreme Court of Wisconsin's shorelands preservation decision in *Just v. Marinette County*.³³ The court concluded:

We do not hold that any time the state requires a proposed development to be reduced by half it may do so without compensation to the owner. We do hold that, under the facts as found by the commission, the instant reduction is a valid exercise of the police power. . . . The owner of private property is not entitled to the highest and best use of his property if that use will create a public harm.³⁴

Finally, even in California, government land use requirements can be takings, as is clear from *Liberty v. California Coastal Commission*.³⁵ There, the court of appeals held that conditioning a construction permit pursuant to its Coastal Zone Conservation Act³⁶ upon applicants' dedicating property for free public parking until 5 P.M. daily was unreasonable and unfair, imposing a burden beyond the applicants' use and shifting government's burden unfairly to a private party.³⁷

B. Plans as Laws

The controversy over the place of planning in land use controls continues.³⁸ Followers of this particular cart/horse bickering will recall that while early model statutes called for planning to precede zoning and for zoning to implement planning, neither in fact occurred. One judge went so far as to equate a zoning ordinance with a plan.³⁹ The plan as a necessary precedent to a valid zoning

31. *Id.* at 10.

32. *Id.* at 12.

33. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

34. No. 58,485, slip op. at 13 (Fla. Apr. 16, 1981).

35. 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).

36. CAL. PUB. RES. CODE. §§ 3000-3825 (West 1972 & Supp. 1981).

37. 113 Cal. App. 3d at —, 170 Cal. Rptr. at 254-55.

38. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976).

39. *Kozesnick v. Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957).

ordinance was revived in Oregon and declared necessary in *Fasano v. Board of County Commissioners*⁴⁰ and *Baker v. City of Milwaukee*.⁴¹ Ordinances not conforming to plans required by statute were declared void. The required conformance of planning to zoning was legislatively repeated in several states.⁴² Present conflict is not so much over whether plans are law (they often are, though few states or their local subdivisions have gone so far as Hawaii which wrote its state plan directly into the statute book, word-for-word⁴³), but over what constitutes consistency or conformance.⁴⁴ What follows is the briefest of looks at the plan as law in selected jurisdictions where current controversies have or will add significantly to the law in this area.

1. *Vermont: Act 250 and the Pyramid*

The Vermont planning law system basically converts a series of state plans into laws by means of its well-known Act 250.⁴⁵ The Act provides for a series of plans, including a capability plan, to be drawn up. It also broadly defines development,⁴⁶ forbids development without a permit,⁴⁷ and requires compliance with certain environmental and other impact criteria and certain of the plans, once adopted.⁴⁸ To hear and pass on permit applications, the Act creates regional District Land Use Commissions, together with an Environmental Board to hear and decide appeals from the District Commission decisions.⁴⁹

In 1977, the Pyramid Company of Burlington (Pyramid) filed an application to build an enclosed regional shopping mall in Williston. The mall was to include 2 department stores, 20 food service establishments, and 80 other shops. It would, along with parking for 2,000 cars, occupy approximately 90 acres on a 200-acre site a quarter-mile from an interstate freeway.⁵⁰

40. 264 Or. 574, 507 P.2d 23 (1973).

41. 271 Or. 500, 533 P.2d 772 (1975).

42. Vermont, California, arguably Florida, and Hawaii.

43. HAWAII REV. STAT. § 226 (Supp. 1979).

44. See, DiMENTO, THE CONSISTENCY DEBATE (1980).

45. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1980). See *The Quiet Revolution in Land Use Controls*, *supra* note 2, at ch. 2; *Land Use and the States*, *supra* note 2, at ch. 3.

46. VT. STAT. ANN. tit. 10 § 6001(s) (Supp. 1980).

47. *Id.* § 6081(a) (1973).

48. *Id.* § 6086(a) (Supp. 1980).

49. *Id.* §§ 6086-6087 (1973 & Supp. 1980).

50. Re: Pyramid Co. of Burlington, Findings of Fact and Conclusions of Law, Vermont District Environmental Commission No. 1 (Application No. 4C0281, 1978) at 1 [hereinafter cited as Re: Pyramid Co.].

In 1978, one of Vermont's District Environmental Commissions denied Pyramid's application.⁵¹ As of this writing, it is still on appeal to the Environmental Board. The findings and conclusions (70-plus pages worth) are instructive, not only as they demonstrate how statutes and planning land use criteria affect the land use decision-making process, but also because they demonstrate the wealth of data the proponents felt compelled to produce before a quasi-judicial body charged with making the initial decision, and show the number of parties who eventually participated.⁵² In carefully tabulated appendix entries (number, date, party), the District Commission lists each party and each exhibit. The exhibits number 156, over half (96) of which come from the applicant. Aside from the applicant, the state of Vermont, Williston, and the county in which it is situated, fourteen additional parties were admitted to the proceedings.

The Commission, in its findings, went through each and every criteria set forth in the Act (many of which are further subdivided into specific directives under a broad criteria heading), carefully setting out what exhibits and testimony were presented with respect to that criteria, stating its conclusion, and discussing how it reached that conclusion. It held that the permit must be denied because the development failed to conform in some way to four of the statutory criteria, including lack of conformance to the statutory capability plan and the local and regional plans.⁵³

As noted above, Act 250 requires development conformance with a duly adopted capability and development plan and with a land use plan.⁵⁴ At the time of the application, Vermont had enacted the former, but not the latter.⁵⁵ The Commission, therefore, looked only to the criteria of the capability and development plan which are set out in the Act as amended in 1973.⁵⁶ Finding that the application would meet the criteria regarding impact on growth, agricultural soils and forests, earth resources, and energy conservation,⁵⁷ the Commission rejected the application for non-conformance with the following criteria set forth in the capability and development plan:

51. *Id.*

52. *Id.* at A-1 to B-2.

53. *Id.* at 3.

54. VT. STAT. ANN. tit. 10, § 6042 (1973).

55. Re: Pyramid Co., *supra* note 50, at 30-31.

56. VT. STAT. ANN. tit. 10, § 6086(9)(a)(A)-(L) (Supp. 1980).

57. Re: Pyramid Co., *supra* note 50, at 30-48.

- a. We find that the development as proposed relies on central sewage treatment facilities, that the Town of Williston has no capital program or plan, and that adequate surety is not provided to the town and conditioned to protect it in the event that it is required to assume the responsibility for the facilities.⁵⁸
- b. We find that the development as proposed to be located in the Town of Williston is not physically contiguous to an existing settlement and that the additional costs for public services and facilities caused directly or indirectly by the development when located on that proposed site outweigh any tax revenue and other public benefits of the development.⁵⁹
- c. We find that necessary supporting highway facilities are not available and will not be available under a duly adopted capital program when the development is completed and that an excessive and uneconomic demand will be placed on existing highway facilities and those that will be available when the development is completed. We find that other necessary supportive governmental and public utility services are available or will be available under such a plan when the development is completed.⁶⁰
- d. We find that the development as proposed will materially interfere with the function and efficiency of the adjacent highway network and the public's use and enjoyment of that network. We find that the development as proposed will not otherwise unnecessarily or unreasonably endanger the public or quasi-public investment in any governmental or public utility facilities, services, or lands to which the lands to be developed are adjacent, and that the development will not otherwise materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to any such facility, service, or lands.⁶¹

The Act further requires the Commission to find that a proposed development is "in conformance with" any duly adopted local or regional plan or "capital program."⁶² The regional plan had been expressly made inapplicable to communities with adopted local plans.⁶³ Here, there was some question as to whether a local plan had been duly adopted. Although the local planning commission had determined that the application conformed to certain aspects of the local plan under consideration, the district commission held that it was free to consider the matter of such conformance on its own:

In view of the State's traditions of local self-government, as exemplified by the provisions of 24 V.S.A. Chapter 117 regarding adoption of local plans, and the desirability of consistency between the actions of different government agencies, a local planning commission's decision that a development conforms with the local plan would under normal circumstances lead to a similar finding by the district environmental commission.

58. *Id.* at 37.

59. *Id.* at 39.

60. *Id.* at 46.

61. *Id.* at 47.

62. VT. STAT. ANN. tit. 10, § 6086(a)(10) (Supp. 1980).

63. Re: Pyramid Co., *supra* note 50, at 50.

We cannot say that the Williston Planning Commission's decision was manifestly wrong on the basis of the evidence available to it, but if the planning commission had been able to consider all the evidence that was before us, it might well have decided otherwise. Not only did it point to "broader concerns which trouble us but are outside our jurisdiction," it expressed specific "concern" as to "the impact . . . on traffic patterns and volumes in the Town," and though "unable to find that the magnitude of this impact will be such as to constitute a violation of any provision of the comprehensive plan" it was careful to point out that this inability was "[o]n the basis of the evidentiary record."

The evidentiary record before the planning commission did not include the detailed data later presented to us in our consideration of criterion 5. We are convinced by this evidence that—regardless of whether there will be "unreasonable congestion" or "unsafe conditions" within the meaning of criterion 5—the impact of vastly increased local traffic will be such as to substantially impair the rural character of the Town.⁶⁴

The district commission did find that the regional plan had been duly adopted and that the proposed development failed to conform to it as well.⁶⁵ It is clear from the foregoing that the major reasons for denying Pyramid's application for permission to develop a regional shopping mall are to be found in the development's lack of conformance to state and regional plans.

2. *Hawaii and the Proliferation of Plans*

Among the fifty states, probably none has attempted to link planning and law so strongly as Hawaii. This is so despite the fact that its landmark land use law,⁶⁶ dividing the land in the state into four districts (agricultural, conservation, urban and rural), was enacted without the benefit of a precedent state plan. This is neither the time nor the place to discuss that law, which has been virtually analyzed to death already.⁶⁷ It is, however, critical to note that the State Land Use Commission, the body charged under the land use

64. *Id.* at 52–53.

65. *Id.* at 55–66.

66. HAWAII REV. STAT. §§ 205 to 205–16.2 (1976 & Supp. 1979).

67. *The Quiet Revolution in Land Use Control*, *supra* note 2; D. MANDELKER, ENVIRONMENTAL AND LAND CONTROL LEGISLATION (1976); HIMAG, GROWTH MANAGEMENT ISSUES IN HAWAII (1977); MYERS, ZONING HAWAII (1975); BOSSELMAN, FUERER & SIEMON, THE PERMIT EXPLOSION (1976); Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979); Mandelker & Kolis, *Whither Hawaii? Land Use Management in An Island State*, 1 U. HAWAII L. REV. 48 (1979); Selinger, Van Dyke, Amano, Takenaka, & Young, *Selected Constitutional Issues Related to Growth Management in Hawaii*, 5 HASTINGS CONST. L.Q. 639 (1978); Callies, *The Quiet Revolution Revisited*, 46 JOURNAL/APA 135 (April 1980); Callies, *Land Use Control in An Island State: Hawaii's State-wide Zoning*, 2 THIRD WORLD PLAN. REV. 187 (1980); Dinell, *Land Use Zoning in a Developing State: A Brief Critique of Hawaii's Land Use Law*, 2 THIRD WORLD PLAN. REV. 195 (1980); Lowty & McElroy, *State Land Use Control: Some Lessons from Experience*, 1 STATE PLAN. ISSUES 15 (1976).

law with drawing the state land use district boundaries, and the State Board of Land and Natural Resources, the body governing the use of land in the conservation district which makes up nearly half the state's land area, must conform their decision making and management to the new state plan and, when adopted, the twelve functional plans mandated therein.

a. THE STATE PLAN

Hawaii is unique among the fifty states in having converted its state general plan into a statute, Act 100.⁶⁸ Its major areas of concentration include: population, the economy (tourism, defense and other federal spending, sugar and pineapple industries, diversified agriculture and potential new areas like motion picture production), the physical environment, facility systems (water supply, transportation, energy, public utility facilities, solid and liquid waste disposal) and sociocultural advancement (housing, health, education, social services, leisure activities, public safety and cultural heritage).⁶⁹

The Hawaii state plan is divided into three major parts dealing with goals, objectives and policies,⁷⁰ planning implementation and coordination,⁷¹ and priority directions.⁷² The goals are divided into the areas of the economy, the physical environment, and the physical, social and economic well-being.⁷³ Objectives, steps toward related goals, reflect "end-states toward which concentrated effort is focused."⁷⁴ Policies are designed to achieve the objectives.⁷⁵

The all-important implementation strategy is accomplished through several mechanisms. A policy council of state, county and public representatives advises the legislature and reconciles conflicts between the agencies and plans described below. Twelve functional plans, to be passed by concurrent legislative resolution, are to define, implement, and conform to the themes, goals, objectives, policies, and priority directions of the state plan. The county plans (general and development) must at least indicate general

68. HAWAII REV. STAT. § 226-1 to -105 (Supp. 1979).

69. DEPARTMENT OF PLANNING & ECONOMIC DEVELOPMENT, THE STATE PLAN (1978) [hereinafter cited as THE STATE PLAN].

70. HAWAII REV. STAT. §§ 226-5 to -28 (Supp. 1979).

71. *Id.* §§ 226-51 to -63.

72. *Id.* §§ 226-101 to -105.

73. THE STATE PLAN, *supra* note 69, at 19.

74. *Id.* at 21.

75. *Id.*

population levels and development patterns, and conform to the aforesaid theme, goals, policies, objectives and priority directions. State programs are to carry out the state plan and must conform to both it and the functional plans. The county and functional planning processes are to be coordinated with the end product, based one upon the other, in the implementation of the state plan.⁷⁶

That part of the state plan dealing with implementation and conformance is the most significant for the purpose of land use and control. This is so because the state plan requires conformance to its policies, goals, objectives and priority direction across virtually the whole spectrum of state and county land use actions.

First, the state plan makes it clear that all state programs are to conform with its theme, goals, objectives, policies and priority directions. "State programs shall be *in conformance with this chapter*. The formulation, administration, and implementation of state programs shall be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, *and the state functional plans adopted pursuant to this chapter*."⁷⁷ These state programs:

shall include, but not be limited to, those programs involving coordination and review; research and support; design; construction, and maintenance; services; and regulatory powers. State programs that exercise coordination and review functions shall include, but not be limited to, the state clearinghouse process, capital improvements program, and coastal zone management program. State programs that exercise regulatory powers in resource allocation shall include but not be limited to the land use and management programs administered by the land use commission and the board of land and natural resources. State programs shall further define, implement, *and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, and the state functional plans adopted pursuant to this chapter*.⁷⁸

As indicated, state programs must conform to the functional plans as well. Certain programs relating to land use control are singled out as "implementation mechanisms":

(D) Decision-making process of the state land use commission. The decisions made by the land use commission shall be *in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, and the state functional plans adopted pursuant to this chapter*. The rules and regulations adopted by the land use commission to govern land use decision making shall be in conformance with the provisions of this chapter.

76. *Id.* at 21-24.

77. HAWAII REV. STAT. § 226-62(a) (Supp. 1979) (emphasis added).

78. *Id.* §§ 226-52(a)(5) (emphasis added).

(E) Decision-making process of the board of land and natural resources. The decision made by the board of land and natural resources shall be in *conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, and the state functional plans adopted pursuant to this chapter*. The rules and regulations adopted by the board of land and natural resources to govern land use decision making shall be in conformance with the provisions of this chapter.⁷⁹

While broad policies are sketched in the state plan, it is the functional plan to which state and county agencies must look for direction.⁸⁰ The state plan provides for the preparation of at least twelve such plans to be adopted by legislative concurrent resolution.⁸¹ “State functional plans shall be prepared for, but not limited to, the areas of agriculture, conservation lands, education, energy, higher education, health, historic preservation, housing, recreation, tourism, transportation, and water resources development.”⁸²

The functional plans must “define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter. *County general plans and development plans shall be used as a basis in the formulation of state functional plans.*”⁸³ The State Plan Act also sets out basic requirements for the functional plans:

(b) The functional plan shall contain objectives to be achieved and policies to be pursued in the primary field of activity and such policies shall address major programs and the location of major facilities. The functional plan shall also contain implementation priorities and actions which may include, but not be limited to, programs, maps, regulatory measures, standards, and interagency coordination provisions.⁸⁴

The initial responsibility for preparing each functional plan lies with named state agencies⁸⁵ which are required to submit their plans periodically to an advisory committee and to the policy council.⁸⁶

After it became apparent that the size of the twelve draft functional plans first submitted to the legislature in 1977 (200–400 pages each) made them unwieldy for the purpose of providing the requested specific directions to state and county agencies, the

79. *Id.* §§ 226–52(b)(2)(D)(E) (emphasis added).

80. *Id.* §§ 226–52(a)(4).

81. *Id.* §§ 226–57(a), 226–58(c)(d).

82. *Id.* §§ 226–52(a)(3) (emphasis added).

83. *Id.* (emphasis added).

84. *Id.* §§ 226–57(b).

85. *Id.* §§ 226–57(a).

86. *Id.* §§ 226–58.

policy council issued draft guidelines⁸⁷ modifying the organization of the plans. Essentially, the draft plans were to be divided into two parts:

- (i) A "technical reference document," to serve as a "principle implementation guide" and containing "essential background information, detailed discussion of current conditions, issues and trends, technical data and analysis, and other information necessary to support the objectives, plans, and policies and implementation priorities presented in the State Functional Plan (*Plan Document*). In other words, much of the tedious descriptive material has been stripped from the functional plan itself.
- (ii) A "Plan document," which is to "detail objectives and policies to be presumed in the functional area and specify short- and long-term actions to be undertaken."⁸⁸

Unfortunately, in 1981 the legislature refused for the third year to pass any functional plans.

The state plan requirements also have significant consequences for the counties which have their own "plans-as-laws" systems. One requirement tying state and county plans together is that "[t]he county general plans and development plans shall be in conformance with the overall theme, goals, objectives, policies, and priority directions contained in this chapter by January, 1982."⁸⁹ This directive is particularly critical to the county land use regulatory scheme since, as discussed below, most county land use control schemes are tied so directly to their general or development plans that land use changes made contrary to those plans are invalid.⁹⁰

87. POLICY COUNCIL, PREPARATION OF STATE FUNCTIONAL PLANS, ch. II (May 23, 1980).

88. *Id.* at II-25.

89. HAWAII REV. STAT. §§ 226-61(c) (Supp. 1979).

90. *Id.* §§ 226-61:

- (a) The county general plans and development plans *shall* be formulated with input from the state and county agencies as well as the general public. County general plans or development plans *shall* indicate desired population and physical development patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique problems and needs of each county and regions within each county. The county general plans or development plans shall further define and implement applicable provisions of this chapter, provided that any amendment to the county general plan of each county shall not be contrary to the county charter. The formulation, amendment, and implementation of county general plans or development plans shall utilize as guidelines, statewide objectives, policies, and programs stipulated in state functional plans adopted in consonance with this chapter.
- (b) County general plans shall be formulated on the basis of sound rationale, data analyses, and input from state and county agencies and the general public, and contain objectives and policies as required by the charter of each county. Further, the county general plans *should*:
 - (1) Contain objectives to be achieved and policies to be pursued with respect to

b. COUNTY PLANS

The charter provisions of Hawaii's four counties relate planning to zoning. The charter for the city and county of Honolulu very closely bind the two. "No public improvement or project, or subdivision or zoning ordinance shall be initiated or adopted *unless it conforms to and implements the development plan* for that area."⁹¹ This language, with differences as discussed below, formerly applied to the adopted general plan, but the general plan, now passed by resolution, has only advisory status.⁹² Although development plans have not yet been adopted, the charter is quite clear as to what they shall contain:

Development Plans. "Development plans" mean relatively detailed schemes for implementing and accomplishing the development objectives and policies of the general plan within the several parts of the city. A development plan *shall include a map of the area of the city to which it is applicable; shall contain statements of standards and principles with respect to land uses within the area for residential, recreational, agricultural, commercial, industrial, institutional, open spaces and other purposes and statements of urban design principles and controls; and shall identify areas, sites and structures of historical, archeological, architectural or scenic significance, a system of public thoroughfares, highways and streets, and the location, relocation and improvement of public buildings, public or private facilities for utilities, terminals and drainage. It shall state the desirable sequence for development* and other purposes as may be important and consistent with the orderly implementation of the general plan.

Development plans *may* contain statements identifying the present conditions and major problems relating to development, physical deterioration and the location of land uses and the social, economic and environmental effects thereof; may show the projected nature and rate of change in present conditions for the reasonably foreseeable future based on a projection of current trends; and may forecast the probable social, economic and environmental consequences of such changes.⁹³

population density, land use, transportation system location, public and community facility locations, water and sewage system locations, visitor destinations, urban design and all other matters necessary for the coordinated development of each county and regions within each county.

- (2) Contain implementation priorities and actions to carry out policies to include but not be limited to, land use maps, programs, projects, regulatory measures, standards and principles and interagency coordination provisions.

91. *Id.* § 5-412 to -413 (emphasis added).

92. *Id.* § 5-408. General Plan. The general plan shall set forth the city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, state or federal. The statements shall include, but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

93. *Id.* § 5-409 (emphasis added).

Given the language of both this section and the section quoted above, some commentators have suggested that all preexisting zoning must also accord with the new development plans, once adopted. This was the position taken by the Supreme Court of Oregon in 1975⁹⁴ when it interpreted legislation requiring that zoning be in accordance with the comprehensive plan of a more general nature than that of Hawaii. In summary, since local zoning and subdivision ordinances must at least prospectively conform to the county development plans, and since these plans must conform to the state plan and, if passed, be based upon the twelve functional plans, it is fair to characterize Hawaii as a state in which the plan is, indeed, law.

3. *New Jersey Pinelands*

Not everyone is agreed that a plan, even one set up as law, ought to have the effect of law. *Re: Pyramid Co. of Burlington* is one example of how a controversy might arise. Basically, however, the plan itself is under collateral attack. This is not so with one of the newest plans made into law which was recently developed to apply to New Jersey's pinelands.

In 1979, New Jersey passed the Pinelands Protection Act⁹⁵ in order to implement, preserve and protect its famous pine barrens.⁹⁶ Slightly under 1 million acres in size and spread over seven counties, the pinelands area is protected by a comprehensive management plan in order to effectuate both state and federal management and preservation policy.⁹⁷ The plan itself is the product of a fifteen-member pinelands commission⁹⁸ established by the Act. Among other things, the plan is directed by statute to contain:

1. A resource assessment, including scenic, aesthetic, cultural and open space areas.

94. *Baker v. City of Milwaukee*, 271 Or. 500, 533 P.2d 772 (1975).

95. The Pinelands Protection Act, N.J. REV. STAT. §§ 13:18A-1 to -29 (1979) as amended by Laws of 1980, ch. 65, adopted July 10, 1980.

96. See J. MCPHEE, THE PINE BARRENS (1967).

97. The National Parks and Recreation Act of 1978 also provides for a federal reserve in the pinelands. 16 U.S.C. § 471i (Supp. III 1979). The federal reserve is substantially congruent with the state reserve. The Act authorizes the state program which S. No. 3091 is intended to implement. See New Jersey Pinelands Comprehensive Management Plan at XVIII-XIX (Nov. 21, 1980).

98. One member was chosen from each of the seven counties, seven were appointed by the then governor of New Jersey and one was appointed by the secretary of the interior. The Pinelands Protection Act, N.J. REV. STAT. § 13:18A-1 to -29 (1979), as amended by Laws of 1980, ch. 65, adopted July 10, 1980.

2. A map showing the boundaries of the Pinelands National Reserve,⁹⁹ including areas of critical ecological importance.
3. A land use capability map and a comprehensive statement of policy for planning and managing the development and use of land in the pinelands area, including land use techniques such as zoning, permit systems, transfer of development rights, and so forth, and including a policy for use of the police power to regulate while recognizing existing economic activities within the area.
4. Detailed financial plans for the acquisition of certain areas.¹⁰⁰

Dividing the pinelands into a protection and a preservation area, the statute sets out the following separate goals for each:

The goal of the comprehensive management plan with respect to the entire pinelands area shall be to protect, preserve and enhance the significant values of the resources thereof in a manner which is consistent with the purposes and provisions of this act and the Federal Act.

....

b. The goals of the comprehensive management plan with respect to the protection area shall be to:

- (1) Preserve and maintain the essential character of the existing pinelands environment, including the plant and animal species indigenous thereto and the habitat therefor;
- (2) Protect and maintain the quality of surface and ground waters;
- (3) Promote the continuation and expansion of agricultural and horticultural uses;
- (4) Discourage piecemeal and scattered development; and
- (5) Encourage appropriate patterns of compatible residential, commercial and industrial development, in or adjacent to areas already utilized for such purposes, in order to accommodate regional growth influences in an orderly way while protecting the pinelands environment from the individual and cumulative adverse impacts thereof.

c. The goals of the comprehensive management plan with respect to the preservation area shall be to:

- (1) Preserve an extensive and contiguous area of land in its natural state, thereby insuring the continuation of a pinelands environment which contains the unique and significant ecological and other resources representative of the pinelands area;
- (2) Promote compatible agricultural, horticultural and recreational uses, including hunting, fishing and trapping, within the framework of maintaining a pinelands environment;
- (3) Prohibit any construction or development which is incompatible with the preservation of this unique area;
- (4) Provide a sufficient amount of undeveloped land to accommodate specific wilderness management practices, such as selective burning, which are necessary to maintain the special ecology of the preservation area; and

99. *Id.*

100. *Id.*

(5) Protect and preserve the quantity and quality of existing surface and ground waters.¹⁰¹

In the summer of 1980, a management plan for preservation uses was duly adopted by the commission.¹⁰² The one for the protection area followed,¹⁰³ and the entire management plan was adopted late in 1980.¹⁰⁴ It is this event which triggers the rather straightforward conformance requirement that converts the plan into law. Each county located in the pineland area must, within a year of the adoption of the management plan, revise its master plan to implement the management plan's objectives and conform with the management plan's minimum standards.¹⁰⁵ Each municipality must review both its plans and its land use ordinances.¹⁰⁶

The plan or plans appear to have become law though apparently not without litigation. According to recent reports,¹⁰⁷ a coalition of landowners, real estate agents and builders have sued to stop the enforcement of the management plan, alleging that the development restrictions on private property contained therein, together with what they regard as inadequate funds available to make purchases, constitute a taking of property. The first case, *Township of Folsom v. New Jersey*,¹⁰⁸ was brought in the state court by two municipalities, a coalition of farmers and an individual landowner challenging the comprehensive management plan on the "taking" issue and on procedural grounds. A hearing is expected in the fall of 1982.¹⁰⁹

The second case, *Hovson's, Inc. v. Secretary of the Interior*,¹¹⁰ was brought in federal court by all the plaintiffs in *Township of Folsom* together with Hovson's, Inc., a land developer, and the Coalition for Sensible Preservation of the Pinelands, real estate, banking and building interests.¹¹¹ The parties sought to enjoin the

101. *Id.*

102. *The Pinelander*, Aug. 15, 1980, at 1.

103. *The Pinelander*, Oct. 1, 1980, at 1.

104. See New Jersey Pinelands Comprehensive Management Plan, *supra* note 97.

105. The Pinelands Protection Act, N.J. REV. STAT. § 13:18A-1 to 29 (1979), as amended by Laws of 1980, ch. 65, adopted July 10, 1980.

106. *Id.*

107. LAND USE PLANNING REPORT at 126 (April 20, 1981); letter from Richard M. Hluchan, New Jersey Deputy Attorney General, to author (May 11, 1981).

108. No. ___ (N.J. Super. Ct. App. Div., filed Jan. 6, 1981). A stay of the plan pending the outcome of the case was denied on January 12, 1981.

109. Letter from Richard M. Hluchan, New Jersey Deputy Attorney General, to author (May 11, 1981).

110. No. 81-97 (D.N.J., filed Jan. 12, 1981).

111. Letter from Richard M. Hluchan, New Jersey Deputy Attorney General, to author (May 11, 1981).

approval of the management plan. The plan was approved by the Secretary of the Interior on January 16, 1981, and the complaint was promptly amended to challenge the approval on the "taking" issue and NEPA procedural grounds. A preliminary injunction was denied on April 22, 1981, and a written opinion on the merits is expected shortly.¹¹²

4. *Rezoning as a Legislative Act*

This section is a final note on the continuing saga of whether land use change is a legislative or a quasi-judicial act. In a decision already questioned by a leading commentator on land use matters,¹¹³ the California Supreme Court held that a subdivision approved, regardless of size, is always a quasi-judicial act, and arguably, a rezoning is always a legislative act.¹¹⁴ By so holding, it reversed the appropriate California district court which had adopted the rule of *Fasano*¹¹⁵ with which we are all familiar. *Sic semper California!*

C. Amortizing Nonconformities¹¹⁶

The issue of nonconformities and how to deal with them has beset zoning administrations, planning commissions, boards of appeal and local councils since the beginning of zoning and before.¹¹⁷ What can be done with a use which lawfully existed prior to the enactment or amendment of a zoning ordinance, but which does not now comply yet continues to exist? Unfortunately, these uses, now granted virtually monopoly status by the new zoning provisions which prohibit the establishment of other like uses or structures, generally refuse to fade away.¹¹⁸

1. *Metromedia: A Case in Point*

Long the province, if not the nemesis, of the zoning practitioner, the nonconformity has from time to time risen to national attention

112. *Id.*

113. HAGMAN, PUBLIC CONTROL OF CALIFORNIA LAND DEVELOPMENT: AN UPDATE (1980).

114. *Arnel Dev. Co. v. City of Costa Mesa*, 98 Cal. 3d 567, ___ P.2d ___, 159 Cal. Rptr. 592 (1980).

115. 264 Or. 574, 507 P.2d 23 (1973).

116. Much of this section is taken from the report of the Subcommittee on Amortization and Nonconforming Uses, a subcommittee both suggested and chaired by Dwight E. Merriam of Robinson, Robinson & Cole, Hartford, Connecticut. For a thorough discussion of the issues and cases touched upon here, that subcommittee report is a gold mine of information.

117. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (a "prezoning case").

118. ANDERSON, AMERICAN LAW OF ZONING § 6.02 (2d ed. Supp. 1980).

when often novel attempts to terminate it come to the attention of the highest state or federal courts.¹¹⁹ So it is now in the matter of *Metromedia, Inc. v. City of San Diego*,¹²⁰ presently pending before the United States Supreme Court. On March 14, 1972, the San Diego City Council adopted a comprehensive billboard ordinance which included, among its purposes, the objective "to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located. . . ."¹²¹ The ordinance includes a variable amortization schedule based on adjusted market value, defined as original cost less ten percent depreciation per year for each year the sign has been in place prior to April 13, 1972, the effective date of the ordinance.

The plaintiffs owned 500 to 800 billboards in the city and challenged the ordinance on six grounds, including a claim that the abatement schedule was unconstitutional. The trial court held for the plaintiffs on grounds of overbreadth and the involvement of free speech. The intermediate appellate court affirmed.¹²²

The California Supreme Court vacated the appellate court's decision, answering six critical questions in favor of the city. The court held: (1) Elimination of billboards is a proper exercise of the police power¹²³ even on aesthetic grounds alone.¹²⁴ (2) "Prohibition of off-site billboards does not violate the First Amendment."¹²⁵ (3) Elimination of billboards without compensation does not deny the owners equal protection of the law.¹²⁶ (4) The amortization schedule of one to four years is not unreasonable on its face, though it may be as to a particular sign.¹²⁷ (5) The issue of noncompliance with the California Environmental Quality Act was summarily dismissed because it was not raised in the complaints.¹²⁸ (6) The ordinance is not preempted by the California Outdoor Advertising Act.¹²⁹

119. *E.g.*, *Jones v. Los Angeles*, 21 Cal. 304, 295 P. 14 (1930); *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); *Art Neon Co. v. Denver*, 488 F.2d 118 (10th Cir.), *cert. denied*, 417 U.S. 932 (1973).

120. 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510, *cert. granted*, ___ U.S. ___, 101 S. Ct. 265 (1980).

121. *SAN DIEGO, CAL., MUNICIPAL CODE* § 101.0700.A (1972).

122. *Metromedia, Inc. v. City of San Diego*, 67 Cal. App. 3d 84, 136 Cal. Rptr. 453 (1977).

123. 26 Cal. 3d at 859, 610 P.2d at 412, 164 Cal. Rptr. at 515.

124. *Id.* at 861, 610 P.2d at 412, 164 Cal. Rptr. at 516.

125. *Id.* at 867, 610 P.2d at 417, 164 Cal. Rptr. at 520.

126. *Id.* at 881, 610 P.2d at 426, 164 Cal. Rptr. at 529.

127. *Id.* at 883, 610 P.2d at 428, 164 Cal. Rptr. at 531.

128. *Id.* at 885, 610 P.2d at 429, 164 Cal. Rptr. at 532.

129. *Id.* at 873, 610 P.2d at 421, 164 Cal. Rptr. at 524.

However, on rehearing, the court decided that the Highway Reactification Act compels compensation for the removal of billboards within 660 feet of a federal interstate or primary highway.¹³⁰

2. Termination: "Passive" Techniques

Termination, whether or not by amortization, is not the only technique which has been applied over the years by communities seeking to rid themselves of nonconformities.¹³¹ The more passive techniques include the following:

a. CHANGE OF USE

Generally, while nonconforming uses may continue, local regulations control conversions under one or more of four approaches: (i) A nonconforming use may be changed to a conforming use; (ii) A nonconforming use may be changed only to one which is "less nonconforming," "more desirable," or permitted in an earlier and more restrictive district; (iii) A nonconforming use may be changed to one which is first permitted in the district; and (iv) A nonconforming use may be changed to any similar use.¹³² Apparently, communities have wide latitude in establishing regulations of this type.¹³³ Problems arising from the use of this technique include: categorizing the existing and new nonconforming uses, measuring the impact of the new nonconforming use, converting accessory uses, changing ownership, and relocation of use.¹³⁴

b. PROHIBITIONS AGAINST EXPANSION

Local ordinances frequently prohibit or severely restrict the expansion of a nonconformity. Sometimes expansion is allowed by special permit. Practical and theoretical problems often result in characterizing a change as an expansion which may include an increase in floor area,¹³⁵ an increase in lot area used,¹³⁶ a change in

130. *Id.* at 877, 610 P.2d at 423, 164 Cal. Rptr. at 526.

131. For general discussion of nonconformities and termination, see ANDERSON, *AMERICAN LAW OF ZONING* at ch. 6 (2d ed. 1976 & Supp. 1980); RATHKOPF, *THE LAW OF ZONING AND PLANNING* at chs. 58-62 (4th ed. 1980); ROHAN, *ZONING AND LAND USE CONTROLS* at ch. 41 (1978 & Supp. 1980); WILLIAMS, *AMERICAN LAND PLANNING LAW* 391-561 (1975 & Supp. 1980).

132. ANDERSON, *supra* note 131, at §§ 6.32-6.41.

133. WILLIAMS, *supra* note 131, at § 112.03.

134. ANDERSON, *supra* note 131, at § 6.34-.38.

135. *Yuba City v. Cherniavsky*, 117 Cal. App. 568, 4 P.2d 299 (1931).

136. *Conway v. City of Greenville*, 254 S.C. 96, 173 S.E.2d 648 (1970).

business or addition of new activities,¹³⁷ and an increase in the intensity of the use.¹³⁸ These changes often are treated differently in the regulations or by the courts.¹³⁹

c. RESTRICTIONS ON RECONSTRUCTION

Zoning ordinances often provide that if a nonconforming use is destroyed or damaged beyond a certain percent of its value as the result of a fire or other catastrophe, the use cannot be reestablished.¹⁴⁰ Some states protect the right to rebuild by statute.¹⁴¹ Problems have been encountered where the percentage reduction is based on assessed value or other formulae which make it impossible to rebuild after even minor damage.¹⁴² An intermediate approach, as with the restrictions on expansion technique, is to use the special permit procedure to allow reconstruction.¹⁴³

d. ABANDONMENT

Zoning regulations often include a provision that once a nonconforming use is abandoned, discontinued or ceases for a period, it cannot be resumed. Some enabling statutes authorize an objective test by providing for a time period for the discontinuance after which the use may not be resumed and by excluding any consideration of intent.¹⁴⁴ Intent and the subject test predominate, although, as one commentator notes, little care has been given to thinking through this area of American planning law.¹⁴⁵

In addition to discontinuance, therefore, intent usually must be proved through physical change, change in business practices, conveyance or attempted conveyance for a different use or passage of time.¹⁴⁶ Still, at least a dozen states accept the objective test and do not consider intent.¹⁴⁷

137. *First Crestwood Corp. v. Building Inspector of Middleton*, 3 Mass. App. Ct. 234, 326 N.E.2d 363 (1975).

138. *Connecticut Sand & Stone Corp. v. Zoning Bd. of Appeals of Avon*, 150 Conn. 439, 190 A.2d 594 (1963); WILLIAMS, *supra* note 131, at § 113.01.

139. Pennsylvania, unlike other states, has developed a doctrine that there is a constitutional right to expand nonconforming uses. WILLIAMS, *supra* note 131, at § 113.08.

140. *State v. Hillman*, 110 Conn. 92, 147 A. 294 (1929).

141. See, e.g., MASS. GEN. LAWS ANN. ch. 40A § 5 (West 1979).

142. WILLIAMS, *supra* note 131, at § 114.04.

143. WILLIAMS, *supra* note 131, at § 114.07, citing *Chilson v. Zoning Bd. of Appeal of Attleboro*, 344 Mass. 406, 182 N.E.2d 535 (1962).

144. WILLIAMS, *supra* note 131, at § 115.05.

145. WILLIAMS, *supra* note 131, at § 115.04.

146. WILLIAMS, *supra* note 131, at § 115.08; *Kuhl v. Zoning Hearing Bd. of Greene Township*, — Pa. Commw. Ct. —, 415 A.2d 954 (1980) (intent is a question of fact).

147. WILLIAMS, *supra* note 131, at § 115.14; *Fuller v. City of New Orleans Department of Safety and Permits, Building Inspection & Permits*, 311 So. 2d 466

These techniques, however, do not assure the eventual elimination of nonconformities. Phased termination, or amortization, does.

3. Termination by Active Means (Amortization)

Amortization is the compulsory termination without compensation of a nonconforming use after a period of time. While the immediate termination of the nonconforming use of a parcel for a brick kiln was upheld in the well-known rezoning case, *Hadacheck v. Sebastian*,¹⁴⁸ that case and a few others are dramatic exceptions to judicial hostility toward compulsory termination.¹⁴⁹

Until the 1950s, the prevailing view, as expressed in the leading case of *Jones v. City of Los Angeles*,¹⁵⁰ was that zoning regulations could not work retroactively to terminate existing uses except in the clearest cases of overriding public necessity.¹⁵¹ An exception was the so-called "nuisance" termination cases.

Certain nonconforming uses are so detrimental to the public health and safety that the courts have upheld immediate elimination.¹⁵² In *Norton Shores v. Carr*,¹⁵³ for example, an appel-

(La. App. 1975); *City of Chicago v. Cohen*, 49 Ill. App. 3d 342, 364 N.E.2d 335 (1977).

148. 239 U.S. 394 (1915).

149. WILLIAMS, *supra* note 131, at §§ 116.02–.06. Other early cases of interest are: *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (upheld establishment of slaughtering monopoly in New Orleans and termination elsewhere); *Hottinger v. New Orleans*, 42 La. Ann. 629, 8 So. 575 (1890) (upheld termination on public health grounds of nonconforming dairies within one year); *Murat v. City of New Orleans*, 119 La. 505, 44 So. 279 (1907) and *City of New Orleans v. Murat*, 119 La. 1093, 44 So. 898 (1907) (upheld termination of nonconforming dairies within ten years using balancing test of public and private good); *State ex rel. National Oil Works of Louisiana v. McShane*, 159 La. 723, 106 So. 252 (1925) (upheld termination of nonconforming filling station); *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929), *appeal dismissed*, 280 U.S. 556 (1929) (upheld by a 4 to 3 vote the termination within one year of nonconforming grocery store deemed to be a public nuisance by local regulation); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929) (upheld termination within one year).

150. 211 Cal. 304, 295 P. 14 (1930).

151. See generally WILLIAMS, *supra* note 131, at § 116.05. In *Jones*, the regulations required the removal of sanitariums which probably had no negative impact on the surrounding residential neighborhood. Other cases of interest are: *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34 (1952) (upheld termination of nonconforming keeping of pigeons, but narrowed the reach of amortization law to uses of inconsequential value); *Town of Somers v. Camarco*, 308 N.Y. 537, 127 N.E.2d 327 (1955) (town may not require removal of equipment from nonconforming gravel pit); *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949) (disallowed termination of nonconforming pool hall as not reasonably related to purposes of zoning); *City of Akron v. Chapman*, 160 Ohio St. 582, 116 N.E.2d 697 (1953) (denied termination of junkyard under terms of ordinance giving city council almost unlimited discretion in setting amortization period).

152. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

153. 81 Mich. App. 715, 265 N.W.2d 802 (1978).

late court upheld a trial court's holding that it could find that a nonconforming use was a nuisance and enjoin that use or order elimination of objectionable features. In this case, the owners of a junkyard and landscaping business were ordered to build a fence to screen the front view and reduce airborne dust.¹⁵⁴ The vested rights doctrine may not apply when public health is in issue, as in requiring a connection to a public sewer.¹⁵⁵ In short, it may be possible to terminate certain uses immediately or after a short period or to impose more rigorous regulations on such uses, if a clear link can be shown with the need to protect public health and safety.

In the last three decades, there has been a remarkable shift in the law toward support for the compulsory termination of nonconforming uses.¹⁵⁶ Notable decisions during the early period of the shift upheld the termination of a Florida filling station in ten years,¹⁵⁷ the termination in five years of certain nonconforming uses in Los Angeles,¹⁵⁸ the removal of billboards after five years,¹⁵⁹ and the removal of junkyards in two years.¹⁶⁰ At least four distinct types of amortization regulations can be identified.

a. FIXED PERIODS

The most often used technique is to fix a time period after which a nonconforming use must be terminated. The regulations occasionally provide for different time periods for different types of uses. The immediate termination of a nonconforming use is infrequently attempted and not often upheld.¹⁶¹ Typical approaches which have been upheld include: three-year amortization of nonconforming signs in an historic district,¹⁶² two-year period for dis-

154. See also *Miller & Son Paving, Inc. v. Wrightstown Township*, 42 Pa. Commw. Ct. 458, 401 A.2d 392 (1979).

155. *Renne v. Waterford*, 73 Mich. App. 685, 252 N.W.2d 842 (1977).

156. See, e.g., *Matter of Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958), cited with approval in *Syracuse Aggregate Corp. v. Weise*, 72 A.D.2d 254, 424 N.Y.S.2d 556 (1980) (court suggests town consider amortization).

157. *Standard Oil Co. v. City of Tallahassee*, 87 F. Supp. 145 (N.D. Fla. 1949) *aff'd*, 183 F.2d 410 (5th Cir.), *cert. denied*, 34 U.S. 892 (1950).

158. *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

159. *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A.2d 36; (1957).

160. *Spurgeon v. Board of Comm'rs of Shawnee County*, 181 Kan. 1008, 31 P.2d 798 (1957).

161. *Town of Somers v. Camarco*, 308 N.Y. 537, 127 N.E.2d 327, 121 N.Y.S.2d 154 (1955) (immediate removal of gravel pit invalidated); *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930); *Kelbro, Inc. v. Myrick*, 113 Vt. 64 30 A.2d 527 (1943).

162. *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 106 Cal. Rptr. 33; (1973).

continuing an automobile junkyard,¹⁶³ one-year period within which to discontinue or screen an automobile junkyard,¹⁶⁴ five-year period for discontinuing nonconforming use of premises other than buildings,¹⁶⁵ and seven-year amortization period for eliminating a dog kennel.¹⁶⁶ The obvious fault with using a fixed period of amortization is that it fails to comprehend fully the variable economic burden on property owners resulting from differing levels of investment. The courts often look at many facts particular to a nonconforming use to determine if the fixed period is reasonable.¹⁶⁷

b. PERIODS KEYED TO INVESTMENT OR VALUE

One alternative to fixed periods is to establish the length of the period on the basis of the investment in the use or its present value. The best-known use of this type is described in *Art Neon Co. v. Denver*¹⁶⁸ in which longer amortization periods were allowed for signs of higher replacement value. Although the court found the regulations to be basically reasonable, it invalidated the variable amortization periods as unrelated to any considerations of the "reasonableness" test. The use of this technique has been upheld in other instances.¹⁶⁹ The principal shortcoming of this approach is that it fails to recognize several other characteristics of uses which may justify longer or shorter periods of amortization.¹⁷⁰

c. VARIABLE PERIOD SET BY ADMINISTRATIVE ACTION

Some amortization regulations grant a local land use legislative board the power to set a reasonable amortization period based on a variety of factors. Courts have upheld several such regulatory schemes incorporating considerations of the character of the neighborhood and the need to have all properties conform to the

163. *Spurgeon v. Board of Comm'rs of Shawnee County*, 181 Kan. 1008, 317 P.2d 798 (1957).

164. *LaChapelle v. Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967).

165. *City of Seattle v. Martin*, 54 Wash. 2d 541, 342 P.2d 602 (1959).

166. *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964).

167. *Gough v. Board of Zoning Appeals*, 21 Md. App. 697, 321 A.2d 315 (1974) (held three-year period not unreasonable where cash investment in junkyard was minimal, the operation was of marginal value, and automobiles could be removed at no cost to the operators).

168. 488 F.2d 718 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1973).

169. *Dallas v. Fifley*, 359 S.W.2d 177 (Tex. Civ. App. 1962) (upheld amortization of drive-in grocery store over period related to recovery of the value of improvements).

170. What is the "investment" to be amortized is discussed in *Harris v. Mayor and City Council of Baltimore*, 35 Md. App. 572, 371 A.2d 706, 708-09 (1977).

zoning regulations.¹⁷¹ The courts, however, are not in agreement as to the validity of using a variable period, particularly when they confront the underlying issue of vested property rights.¹⁷²

The obvious advantage of this approach is that it allows "fine-tuning" of the amortization period and is capable of balancing the competing objectives of maximizing recovery of the investment in the improvement, protecting the property owner from undue economic burden, minimizing the impact on surrounding uses and promoting the orderly development of the neighborhood. Carefully drafted local regulations are necessary if this technique is to be defensible. Enabling legislation may be helpful.

d. NEGOTIATED PERIOD

In a few instances, courts have upheld amortization periods established by agreement between governmental authority and the private landowner.¹⁷³ In one instance, the owner of a nonconforming park was allowed to expand the use by special permit in return for agreeing to discontinue the use entirely in a shorter period than allowed by the ordinance.¹⁷⁴ Agreements to terminate may be reached in settlement of an enforcement action¹⁷⁵ and may remain effective even after annexation of the area by a municipality which allows nonconforming uses to continue.¹⁷⁶

For those jurisdictions without the clear authority to amortize nonconformities, the negotiated approach offers some help. Expansion of nonconformities by special permit could be tied to an agreement to terminate the use. Whether this will work probably depends on a variety of economic factors beyond the scope of this review.¹⁷⁷

4. *Amortization in Action*

The type of use often suggests appropriate amortization techniques. Open uses, such as junkyards and lumber storage yards

171. ANDERSON, *supra* note 131, at § 6.70 citing *Dallas v. Halbert*, 246 S.W.2d 686 (Tex. Civ. App. 1952); *Dallas v. Fifey*, 359 S.W.2d 177 (Tex. Civ. App. 1962); *People v. Gates*, 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974).

172. *Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953). *See also* Annot., 42 A.L.R. 2d 1140 (1945).

173. ANDERSON, *supra* note 131, at § 6.71.

174. *Edwards v. Los Angeles County*, 40 Cal. 2d 642, 255 P.2d 772 (1953).

175. *North Castle v. Windmill Farm Homes, Inc.*, 36 Misc. 2d 551, 23 N.Y.S.2d 551 (1962).

176. *City of Mahtomedi v. Spychalla*, 308 Minn. 429, 243 N.W.2d 31 (1976).

177. Among the factors may be present value of future use; increase in short term profits; the present level of profits; and the owner's reservation price.

are obvious candidates for rapid amortization by police power regulation alone. Where physical improvements are of small value and the cost of removing materials stored on the property is little, the courts have been willing to find short periods of amortization reasonable.¹⁷⁸

For billboards and other signs, various amortization techniques are appropriate. The *Metromedia* case has already been discussed. Other courts have also generally upheld amortization periods for signs.¹⁷⁹ Running through the many cases in this area are several considerations: the capital investment in signs is usually not substantial; many signs have been in use for a long time; signs are a severe form of visual blight; there are many alternatives for advertising; the elimination of a sign seldom leaves a property with no reasonable beneficial use; and the character of whatever rights are vested is such that these rights deserve little protection.

In conclusion, the *Metromedia* case raises the question of full or partial compensation for the termination of nonconforming uses.¹⁸⁰ Some uses with large capital investment simply will require too long a period to amortize the cost of the improvements. One commentator argues that to amortize obnoxious uses is unfair to the neighborhoods which suffer the burden.¹⁸¹ The answer may be immediate or accelerated termination with full or partial compensation by utilizing the eminent domain power.¹⁸² The fiscal realities of today's economy, however, may prevent much use of this approach. A favorable decision by the Supreme Court in *Metromedia* will open the door to more aggressive programs to eliminate certain nonconformities. A restrictive decision is likely to inhibit the development of strategies based solely on regulation, but may stimulate consideration of full and partial compensation for eliminating nonconforming uses.

178. See ROHAN, *supra* note 131, at § 41.04[3][a].

179. *Id.* at § 41.04[3][a].

180. Following close on the heels of *Metromedia* is *United Business Comm. v. City of San Diego*, 91 Cal. App. 3d 156, 154 Cal. Rptr. 263 (1979).

181. ANDERSON, *supra* note 131, at § 6.72.

182. This taking would be for a public purpose. *Berman v. Parker*, 348 U.S. 26 (1954). Some enabling statutes provide for the condemnation of nonconforming uses and structures. See ARIZ. REV. STAT. ANN. § 9-462.02 (1977). Such statutes may preclude local efforts, even by chartered municipality, to use the police power to force termination. *City of Scottsdale v. Scottsdale Associated Merchants, Inc.*, 120 Ariz. 4, 583 P.2d 891 (1978) (local ordinance declaring nonconformity signs illegal is void because it conflicts with state law).

D. Increasing Housing Opportunities through Land Use Planning and Zoning¹⁸³

1. *Exclusionary Zoning*

The use of zoning or other land use control mechanisms to exclude various ethnic, racial or economic minorities has been a fact of land use control life virtually since the inception of zoning itself.¹⁸⁴ The continuing saga of the Village of Arlington Heights and the attempt of the Metropolitan Housing Development Corporation to build low- and moderate-income multifamily housing there has added much to the law of exclusionary zoning.¹⁸⁵ The more salient points include: A constitutional challenge will fail unless it can be shown that the local authority intended to discriminate;¹⁸⁶ nevertheless, it is also possible to show such intent by less than an overt expression.¹⁸⁷ Fortunately, that litigation has, after nearly ten years, now been concluded. Although the case was settled by consent decree, the Seventh Circuit thereafter entertained objections to the decree made by a nearby village and others who had intervened in the district court proceeding.¹⁸⁸ The issue raised on appeal was whether the district court properly entered the decree which ended the dispute. The site specified in the consent decree for the development of federally subsidized, low-cost housing was property then outside Arlington Heights, which was to be annexed

183. For research and the presentation of a subcommittee report on this section, I am indebted to Marc D. Brookman and Amy E. Slater of Duane, Morris & Heckscher, Philadelphia, and Frederic Hu, a third-year law student at the University of Hawaii School of Law.

184. Indeed, some commentators have declared that to be the sole purpose of zoning. See e.g., HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* (2d ed. 1980). See generally BABCOCK & BOSSELMAN, *EXCLUSIONARY ZONING* (ASPO 1975).

185. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 373 F. Supp. 208 (N.D. Ill. 1974), 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 429 U.S. 252 (1977), *on remand*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). For comments, see Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977); Callies & Weaver, *The Arlington Heights Case: The Exclusion of Exclusionary Zoning Challenges*, 2 REAL EST. ISSUES 22 (1977); Callies & Weaver, *The Arlington Heights Case: A Reprise*, 3 REAL EST. ISSUES 37 (1978).

186. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

187. *Id.*; *Metropolitan Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

188. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980).

and rezoned.¹⁸⁹ The court noted that the present case aligned the interests of both local and national government against the alleged rights of the neighboring individual landowners who claimed that the value and marketability of their property would be reduced by the relief granted in the consent decree.¹⁹⁰ The court further noted that the authority to zone the subject property rested solely in Arlington Heights pursuant to a boundary agreement of June 21, 1976 and that the Board of Trustees of Arlington Heights approved the consent decree as a legislative act. Neighboring landowners were unable to prove that this legislative zoning determination bears no substantial relation to the public health, safety, morals or general welfare.¹⁹¹ The court found that both the national policy of the Fair Housing Act of 1968¹⁹² and the state policy establish that the annexation and rezoning required of Arlington Heights by the consent decree bears a substantial relation to the general welfare.¹⁹³ Furthermore, the court noted that there is no per se rule against ordering remedial efforts beyond the municipal boundaries of the city where the constitutional violation occurred.¹⁹⁴ In approving a settlement, a trial court is not required to inquire into the precise legal rights of the parties nor reach and resolve the merits as long as the settlement is "fair, adequate, reasonable and appropriate" under the particular facts and there has been valid consent by the concerned parties. In the absence of plain error, abuse of discretion, arbitrary action or a failure to determine that a settlement is equitable and in the public interest, an agreement will not be reversed on appeal.¹⁹⁵

189. *Id.* at 1010. The new site consists of a twenty-six acre tract annexed from an unincorporated area of Cook County. The development plan provides for commercial use of fourteen acres with the remaining twelve acres to be developed for a four-story building and two-story attached townhouses totalling 189 units. *Id.* at 1009. The original site was a fifteen-acre tract which was to be developed for 190 units consisting of twenty two-story clustered townhouses. *Id.*

190. *Id.* at 1012.

191. *Id.*; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

192. 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979).

193. 616 F.2d at 1012-13.

194. *Id.* at 1013.

195. *Id.* at 1015. The court also discussed the Fair Housing Act policy favoring settlement and the contribution toward achievement of the statutory goals by voluntary compliance. *Id.* at 1014. In his dissent, Circuit Judge Pell found that the goal behind the consent decree had been frustrated by allowing Arlington Heights to remedy its exclusionary zoning policy by satisfying the requirement to provide for multiple-family use in an area which is on the outskirts of the village and was not part of the village until the consent decree was entered. *Id.* at 1016. The dissent also held that the property interests of the intervenors had been violated

2. "Inclusionary Zoning"

Communities concerned with providing low- and moderate-income housing have tried a variety of techniques over the past twenty years to correct housing imbalances. Many such techniques involve some compulsory quota or percentage.¹⁹⁶ Increasingly, the techniques involve a mandatory levy of low-income units or money to pay for such units as a precondition for constructing a housing development. Whether the levy is exercised at the rezoning, special permit or building permit stage, it is usually called "inclusionary zoning," as distinguished from "exclusionary zoning," though in fact it is not zoning at all.

In 1973, inclusionary zoning suffered a setback at the judicial level from which it has not wholly recovered, though, as will appear below, communities are still enacting inclusionary zoning schemes. In *Board of Supervisors v. DeGroff Enterprises*,¹⁹⁷ it may be recalled, an amendment to a local zoning ordinance required a developer of more than fifty dwelling units to build at least 15 percent suitable for low- and moderate-income families. Although there was a bonus feature (density standards were relaxed to permit one additional "regular" dwelling unit for each two units of the "low-moderate" variety, but only up to a maximum of 120 percent of the normally permitted densities), the 15 percent requirement was mandatory.¹⁹⁸ In a terse opinion, the Supreme Court of Virginia declared the ordinance invalid on the ground that it constituted "socioeconomic" zoning, exceeding the authority of the local zoning enabling act, and amounted to a taking without compensation.¹⁹⁹

This decision has not deterred other jurisdictions from dealing with the need for low- and moderate-income housing through inclusionary techniques. Such inclusionary housing programs were adopted in 1980 by Boulder, Colorado and Monterey County, California.

by the closed-door rezoning of neighboring land which precluded the opportunity to protect the value of their land.

196. See, e.g., *The Quiet Revolution in Land Use Control*, *supra* note 2, at ch. 6; Franklin, Falk & Levin, *In-Zoning: A Guide for Policymakers on Inclusionary Land Use Program*, in POTOMAC INSTITUTE (1974).

197. 214 Va. 246, 198 S.E.2d 600 (1973).

198. *Id.* at —, 198 S.E.2d at 601-02.

199. *Id.* at —, 198 S.E.2d at 602. See Comment, *Board of Supervisors v. DeGroff Enterprises, Inc.: A Case of Inclusionary Zoning*, 60 IOWA L. REV. 413 (1974); Baade, *Required Low Income Housing in Residential Developments*, 16 ARIZ. L. REV. 439 (1974); Bozuug, *Can an "Inclusionary" Land Use Plan Withstand a Right to Travel Challenge?*, 10 SUFFOLK L. REV. 623 (1976).

Boulder Ordinance No. 4495²⁰⁰ was enacted to halt the resale of units constructed pursuant to Resolution 115²⁰¹ and/or the growth control ordinance in contravention of the goals of those ordinances. Resolution 115 requires that 15 percent of the total units built in new residential development on property annexed by the city must be low- and moderate-income housing. The growth control ordinance provides a point system to assist developers in obtaining building permits by their agreement to provide moderate-income housing. The housing thereby provided had been depleted by resales at prices above low- and moderate-income levels. The Moderate Income Sales Program is designed to maintain future units constructed for low- and moderate-income persons within that market for fifteen years. The developer agreement sets forth the initial restrictions. The original sale price of such units will be set by the City of Boulder Housing Authority (BHA), and, if the developer is unable to sell the unit within six months, the BHA will purchase or arrange for the purchase of the unit. The warranty deed must contain a right of first refusal in BHA. The purchaser must also enter into an agreement with BHA, covenanting:

- a. that the unit will be owner-occupied with the exception of periods not to exceed eighteen months for which permission is granted upon written request;
- b. that the owner will give written notice to BHA of his intent to sell, thus enabling BHA to exercise its right of first refusal; and
- c. that the owner will sell the property only to BHA or another qualified buyer at a price no greater than the purchase price plus the cost of major permanent improvements and a percentage increase based on the HUD median-income estimates at the time of the resale.

The Monterey County ordinance was adopted to meet the requirements of a growth management amendment to the county general plan.²⁰² It provides a program of resale control to ensure the continuing availability of low- and moderate-income housing and thereby enhances the public welfare.²⁰³

200. Boulder, Colo., Ordinance 4495 (May 6, 1980).

201. Boulder, Colo., Resolution 115 (1973).

202. The county has admittedly not completed its updating of the housing element to the general plan. Monterey County Cal., Ordinance —, § 1.1 (1980).

203. *Id.* §§ 1.5, 2.

All new residential development projects are required to contribute to the provision of housing for low- and moderate-income households. In all development projects of five or more units, contribution must at least equal 15 percent of the total number of units approved for the project. The requirement, however, may be satisfied at the election of the developer:

- a. by on-site construction;
- b. by construction at another location within the county;
- c. by transfer of title to residential lots within the project to the housing authority;
- d. by transfer of title to approved residential lots outside the development
- e. by payment of a sum of money to the housing authority in accordance with the given formula; or
- f. by any combination of the above.²⁰⁴

Developments of fewer units must contribute as well; however, the percentage requirement is scaled down. The ordinance also gives commercial and industrial developers the opportunity to participate in the plan and so derive its benefits.²⁰⁵ When a developer provides for more than the minimum number of units required, a density bonus of one lot or unit per inclusionary unit provided is that which shall be transferable or salable.²⁰⁶

The ordinance also provides for the continuing availability of the units by imposing restrictions on rentals and sales. The resale provisions provide that the units must first be offered to the housing authority and then to the developer. If neither party accepts, the unit may be sold free of the restrictions. If either the housing authority or the developer purchases the unit, the purchase price is based on the lesser of two amounts reached per formula.²⁰⁷ The availability of the units for low- and moderate-income households expires after fifty-nine years.²⁰⁸

The ordinance also allows for county involvement in providing low- and moderate-income housing by the waiver of building permit fees on the inclusionary portion of the project as well as by any of the following:

- a. reduction of costs of governmental approval process;

204. *Id.* at § 4.3A.

205. *Id.* at § 4.4.

206. *Id.* at § 4.3D.

207. *Id.* at § 4.6.

208. *Id.* at § 4.6D.

- b. relaxation of public improvement and development standards;
- c. allowance of bonus densities (one per inclusionary unit);
- d. providing additional land for residential development;
- e. relief from the costs of infrastructure improvements; and
- f. use of publicly generated funds to reduce development costs.²⁰⁹

Monterey County has provided a vast array of options to developers in order to generate incentive for participation in the program.

One of the more innovative inclusionary devices, "ohana (family) zoning," has recently been enacted by Hawaii. Provided there is adequate infrastructure and parking, each county is required to permit two dwelling units in each residential zone, including the previously sacrosanct R-1. Yard and other bulk requirements per lot will still apply, so not all lots or all neighborhoods will have the advantage of the new laws. It is hoped that the law will increase the number of dwelling units, especially in the lower-price range, in a state where, for example, the average price of a single-family home in the Honolulu area exceeds \$170,000.

3. *Miscellaneous Exclusionary Devices:* *New Cases*

a. MINIMUM LOT REQUIREMENTS

In *Martin v. Township of Millcreek*,²¹⁰ the Pennsylvania court took a Solomonlike stance with respect to a ten-acre minimum lot requirement for single-family dwellings: unduly restrictive but not exclusionary. The plaintiff failed to demonstrate that the requirement excluded population from the township or that the township failed to provide for acceptance of a "fair share" of any class of housing.²¹¹ The court held that although the ten-acre requirement applied to only one zone, which covered one-third of the township, it was not justifiable, even on watershed protection grounds, and so was unconstitutionally unreasonable.²¹²

209. *Id.* at § 4.7B.

210. 50 Pa. Commw. Ct. 249, 413 A.2d 764 (1980).

211. *Id.* at ___, 413 A.2d at 766. The township imposed the ten-acre minimum in the "E-1 Ecologically Sensitive District" which covers one-third of the township's area. A one-acre minimum lot size is required in other areas of the township. *Id.* at ___, 413 A.2d at 765.

212. *Id.* at ___, 413 A.2d at 768. The township also attempted to justify its ordinance through its comprehensive plan by showing the rural nature, population stability, low growth rate and availability of growth space in the township, as well as the one-acre minimum lot requirement in one-third to one-half of the

On the other hand, a New York court upheld a five-acre minimum lot size in *Kursius, Inc. v. Incorporated Village of Upper Brookville*.²¹³ Noting that minimum acreage requirements had been upheld as a means of protecting open space and halting urbanization,²¹⁴ the court held the lot size ordinance by itself was not an indicia of exclusion, did not ignore regional needs, and did comply with comprehensive plans.²¹⁵

Other recent cases deal with the exclusion of or restrictions on the number of town houses,²¹⁶ midrise apartments,²¹⁷ housing for the elderly²¹⁸ and mobile home parks.²¹⁹

E. Short Takes²²⁰

Land use, planning and zoning being a fertile field, the recent developments in the various specialized areas are each easily worthy of treatment in a full-length article. Some of the highlights are set out below.

1. Historic Preservation

It is hard to beat the blockbuster served up in 1978 when the Supreme Court decided *Penn Central Transportation Co. v. New York City*.²²¹ There, the Court upheld New York City's historic

township. *Id.* In addition, the court noted that none of the township's evidence related the zoning purposes to the deprivation of value inherent in the ten acre per dwelling requirement. *Id.*

213. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980).

214. *Id.* at 344, 414 N.E.2d at 683, 434 N.Y.S.2d at 183.

215. *Id.* at 345-46, 414 N.E.2d at 684, 434 N.Y.S.2d at 184.

216. *In re Appeal of Kravitz*, ___ Pa. Commw. Ct. ___, 419 A.2d 227 (1980) (zoning ordinance effectively prohibiting townhouse use struck down).

217. *Board of Supervisors v. Gentsch*, 51 Pa. Commw. Ct. 455, 414 A.2d 110 (1980) (ordinance upheld though mid-rise apartments permitted only as part of planned development).

218. *Apfelbaum v. Town of Clarkstown*, 104 Misc. 2d 371, 428 N.Y.S.2d 38 (1980) (upheld zoning code which prohibited construction of over 106 dwelling units at any senior citizen housing site and prohibited senior citizen dwelling from being constructed within 1500 feet of each other).

219. *Environmental Communities of Pennsylvania, Inc. v. North Covent Township*, 49 Pa. Commw. Ct. 167, 412 A.2d 650 (1980); *In re Appeal of Hum Village*, 51 Pa. Commw. Ct. 465, 414 A.2d 768 (1980).

220. Much of this section was culled from subcommittee reports of the Committee on Land Use, Planning and Zoning submitted by the following chairmen: Christopher J. Duerksen of the Conservation Foundation, Washington, D.C. (Historic Preservation); Charles J. Liberto, City Attorney, Arcadia, California (Aesthetics and Architectural Controls); Alan N. Jensen of Pueblo, Colorado (208 and other Federal Clean Water Act cases); John M. Armentano of Williston Park, New York (§ 1983 Actions and Land Use); and William K. Fahey of Lansing, Michigan (Citizen Participation in Land Use Decision Making).

221. 483 U.S. 108 (1978).

preservation law against a challenge that the denial of a certificate of appropriateness to construct a highrise office building atop Grand Central Station constituted an unconstitutional taking of property without compensation. At least one of the reasons for the decision was the provision in the ordinance permitting transfer of development rights, thereby lost, to nearby parcels, a form of "compensable regulation" the importance of which is considerably increased following the *San Diego Gas & Electric Co.* decision discussed earlier.

One of the recent important developments in this area is the 1980 amendment of the National Historic Preservation Act.²²² First, the amendments provide that a property may not be listed on the National Register of Historic Places if the owner thereof objects.²²³ Listing is critical as in many instances it triggers delays and places obstacles in the path of state and federal action which would damage or destroy listed properties.²²⁴ Second, local governments are given significant power over registered nominations if the local historic preservation programs meet certain minimum standards, such as when they:

- a. enforce appropriate state or local legislation for the designation and protection of historic property;
- b. have established an adequate and qualified historic preservation review commission by state or local legislation;
- c. maintain a system for the survey and inventory of properties;
- d. provide for adequate public participation in the local historic preservation program, including a process of recommending property for nomination to the National Registry; and
- e. satisfactorily perform the responsibility delegated to them under the Act.²²⁵

Meeting such standards results in a certified local program which can qualify the local government for federal funding programs.

For local governments acting to designate and preserve historic properties pursuant to the National Historic Preservation Act, it is worth noting recent decisions which have held, *inter alia*, that mere designation does not usually result in a "taking" of property by

222. 16 U.S.C. §§ 470-470ee (1976 & Supp. III 1979), as amended by Pub. L. No. 96-515, §§ 101-507, 94 Stat. 2987.

223. Pub. L. No. 96-515, § 201(a), 94 Stat. 2988 (1980).

224. For example, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979), requires the consideration of alternatives when a federally initiated, licensed or funded project adversely affects a listed property.

225. Pub. L. No. 96-515, § 201(a), 94 Stat. 2988 (1980).

regulation;²²⁶ that a building need not be of extraordinary significance to be accorded protection;²²⁷ but that delay in designation, including a moratorium of indefinite duration for the purposes of drafting a preservation plan,²²⁸ can be fatal.²²⁹ Moreover, restoration of a landmark may be required under certain circumstances.²³⁰ In case of conflict between governmental agencies, some courts have examined the mandate of the governmental entity to see whether it should be subject to a historical preservation law.²³¹

2. *Aesthetics and Architectural Controls*

Besides *Metromedia, Inc. v. City of San Diego* discussed above, several other jurisdictions have dealt with aesthetics in the past year or two. Colorado upheld on aesthetic grounds a setback ordinance prohibiting structures less than four feet from the property boundary.²³² Illinois shifted to the developer the burden of proving that aesthetic regulations have no relationship to the public health, safety or welfare.²³³ New Jersey found aesthetics a legitimate end for municipal zoning.²³⁴ In Washington, attractiveness and beauty in the architectural scene are appropriate general welfare concerns at the municipal level.²³⁵ Florida found that preserving the historical character of a neighborhood is a valid exercise of the police power through zoning.²³⁶

3. *Clean Water Act and Land Use*

A procedural matter of some importance, though not directly related to land use, has recently been decided by the Third Circuit.

226. *Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980).

227. *Society for Ethical Culture v. Spatt*, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1979), *aff'd*, 52 N.Y.2d 1031, 420 N.E.2d 102, 438 N.Y.S.2d 304 (1981).

228. *Southern Nat'l Bank of Houston v. City of Austin*, 582 S.W.2d 229 (Tex. Civ. App. 1979) (landmark law held to impose "scenic event" thereby damaging property in violation of the Texas Constitution's "taking" clause).

229. *Life of the Land, Inc. v. City of Honolulu*, 592 P.2d 26 (Hawaii 1979); *Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta*, 497 F. Supp. 504 (N.D. Ala. 1980).

230. *LaFayette Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. Ct. App. 1980).

231. *State of Washington v. City of Seattle*, 94 Wash. 2d 162, 615 P.2d 461 (1980). See, e.g., Ross, *Intergovernmental Zoning Disputes: A Continuing Problem*, 32 LAND USE AND ZONING DIG. 6 (1980).

232. *City of Leadville v. Road*, 198 Colo. 328, 600 P.2d 62 (1980).

233. *Ward v. County of Cook*, 68 Ill. App. 3d 563, 386 N.E.2d 309 (1980).

234. *State v. Miller*, 174 N.J. Super. 253, 416 A.2d 81 (1980).

235. *Duckworth v. City of Bonney Lake*, 91 Wash. 2d 19, 586 P.2d 860 (1978).

236. *Moviematic Indust. Corp. v. Metropolitan Dade County*, 349 So. 2d 667 (Fla. 1980).

In *National Sea Clammers Ass'n v. New York*,²³⁷ the court discussed the extent to which citizens' suits may be brought for violations of the Clean Water Act. Plaintiffs had failed to give the required sixty-days' notice under section 505(a) of the Act.²³⁸ Noting a conflict in circuits over the issue, the court found an alternative basis for the suit in section 505(e).²³⁹

The federal courts have also held that EPA Clean Water Act regulations promulgated after a statutory deadline are probably valid anyway and are binding upon most of the parties intended to be regulated absent a showing of substantial prejudice or substantial deviation or time between the proposal and promulgation stages.²⁴⁰

Jurisdictional conflict in the promulgation of Clean Water Act regulations and Surface Mining and Reclamation Act regulations was resolved in favor of the former.²⁴¹

4. 42 U.S.C. § 1983 Actions in the Area of Land Use

After *Monell v. Department of Social Services*,²⁴² *Owen v. City of Independence*,²⁴³ and *Maine v. Thiboutot*,²⁴⁴ it now appears the doors are open in both federal and state courts to actions under section 1983 of the Civil Rights Act²⁴⁵ for the review of land use decisions made by legislative bodies if such decisions are alleged to violate either federal Constitution or statute. It is apparently open to a prospective plaintiff to choose either a federal or a state court as the forum in which to file his cause of action. If the state court is chosen, a major problem of proof can arise because issues dealing with the claim of unconstitutionality of a legislative enactment must be proven beyond a reasonable doubt by a quantum of evidence. Although there appears to be no direct appellate authority on the subject in the federal system, it has been held that under section 1983 the burden of proof is that in other civil rights action,

237. 616 F.2d 1222 (3d Cir. 1980).

238. 33 U.S.C. § 1365(a) (1976).

239. 33 U.S.C. § 1365(e) (1976); 616 F.2d at 1227-28.

240. *Commonwealth of Pennsylvania v. EPA*, 618 F.2d 991 (3d Cir. 1980); *Mississippi Comm'n on Natural Resources v. Costle*, 625 F.2d 1269 (5th Cir. 1980).

241. *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980).

242. 436 U.S. 658 (1978).

243. 445 U.S. 662 (1980).

244. 444 U.S. 1042 (1980).

245. 42 U.S.C. § 1983 (1976).

and the fact that a zoning enactment is being tested is no reason to increase this burden. In *Omnia Properties Inc. v. Town of Brookhaven*, the federal district court for the Eastern District of New York determined:

Defendants also urge plaintiff's burden is to establish the invalidity of the zoning ordinance "beyond a reasonable doubt." While it is true that New York's Court of Appeals has used that language in some cases . . . , there does not appear to be any articulated reason why the level of proof in a zoning case should differ from that applicable to other civil litigation. Nor does the "reasonable doubt" standard of proof for a criminal case seem particularly appropriate here, where the evidence is basically uncontested and the only dispute is over its interpretation and proper application in a constitutional context. In any event, this Court is not bound on a constitutional issue by whatever level of proof the New York State court might choose to uphold. For purposes of this case, tried without a jury, the Court assumes that any fact may be taken as true if it is supported by a fair preponderance of the credible evidence, a general standard appropriate to most civil cases.²⁴⁶

It is suggested that this standard of proof forms a part of the cause of action and should be binding upon the state court judge when the proceeding is brought in the state court. There are, however, no decisions directly on whether, assuming a lesser standard of proof, the state court, sitting in a section 1983 case, must apply the federal standard.

5. Referendum Zoning

The use of a referendum to recall zoning amendments has been an issue of critical importance since the Supreme Court's 1976 decision in *Eastlake v. Forest City Enterprises*.²⁴⁷ There, the Court upheld the authority of a home-rule municipality which by charter provided automatically for such referenda on each and every rezoning by the city council. The decision had interesting implications for those espousing the theory that rezonings may be quasi-judicial if the parcel involved is small enough and the interested parties few and localized enough.²⁴⁸ Such rezonings would then presumably be referendum-proof.

While at least one court held a referendum provision in a city charter inapplicable to rezoning decisions because the applicable zoning enabling act did not include an express authorization

246. No. 77-C-574 (E.D.N.Y., decided Dec. 26, 1979).

247. 426 U.S. 668 (1976). See Bell, *The Referendum Issue: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Callies, *The Supreme Court Is Wrong About Zoning by Popular Vote*, 42 PLANNING 4 (Dec. 1976).

248. *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973).

therefore,²⁴⁹ a more recent case from Michigan has upheld such a provision.²⁵⁰ An interesting juxtaposition of charter-authorized referendum upon petition versus vested rights is due to be decided soon in Hawaii. There, a county charter provision specifically protecting vested rights in the event a referendum overturns a rezoning was held to protect a developer who continued to build a coastal resort hotel even after petition for referendum was accepted and the referendum was overwhelmingly passed.²⁵¹

249. *San Pedro North, Ltd. v. City of San Antonio*, 562 S.W.2d 260 (Tex. 1978), *cert. denied*, 439 U.S. 1004 (1978).

250. *Huxtable v. Meridian*, __ Mich. App. __, 302 N.W.2d 282 (1981).

251. *County of Kauai v. Pacific Standard Life Ins. Co.*, No. 2388 (5th Cir. Feb. 9, 1981).

